The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' RESPONSE TO ORDER PROVIDING NOTICE OF THE APPOINTMENT OF A SPECIAL MASTER

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The Government respectfully objects to the Court's March 24, 2020 proposal, Dkt. 466, to appoint a special master.[1] Appointment of a special master to resolve discovery disputes is only appropriate if there is an "exceptional condition" for doing so or if discovery issues "cannot be effectively and timely addressed by an available district judge or magistrate judge of the district," absent consent of the parties. Fed. R. Civ. P. 53(a)(1)(C); *Burlington N. R.R. Co. v. Dep't of Rev.*, 934 F.2d 1064, 1072 (9th Cir. 1991) (holding appointment of special master by district court was abuse of discretion).

1. Plaintiffs already have obtained more discovery than permissible for judicial review of the challenged military policy. Under the governing standard of review, the Court must determine in the first instance if DoD "reasonably determined [its] policy 'significantly furthers' the government's important interests," *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019); *see also id.* ("[T]he district court must apply appropriate military deference to its evaluation of the 2018 policy"). The Government has produced nearly 50,000 documents in discovery, including an unredacted Administrative Record of the documents relied on by the Panel of Experts charged with developing the challenged policy, as well as deliberative documents of the Panel. As a result, DoD has already produced the documents that went into its decision-making and thoroughly explained its reasons for the challenged policy. *See id.* at 1206 n.22 (noting that in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) a 12-page Proclamation was sufficient for judicial review). Facilitating further discovery through the appointment of a special master is not appropriate here. *See* Dkt. 405-3, *Doe* Hr'g 20:1-5 (district court in the related case *Doe 2 v. Esper*, No. 17-cv-1597 (D.D.C.), rejecting further discovery into DoD's deliberations); *Doe v. Shanahan*, 917 F.3d 694, 736-7 (Williams, J., concurring in result).

Referring to a special master discovery issues that invoke the military's

[1] The Government did not interpret the Court's Order as contemplating the referral of issues pertaining to the presidential communications privilege, classified information, or the attorney client privilege or work product doctrine, and therefore, has focused its objection on the deliberative process privilege. However, the Government would also object to the referral of any additional privilege issues to a special master.

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"serious…national defense interests[,]" *see Karnoski*, 926 F. 3d at 1206, is particularly problematic. Discovery in this action already has resulted in *in camera* review of non-responsive documents that relate to a range of military policy matters. *See* Notice, Dkt. 468. A private citizen should not be authorized to review documents concerning military personnel policy, let alone military policy more broadly.

2. There is no good cause to refer discovery issues to a special master. This case does not involve an "exceptional condition", Fed. R. Civ. P. 53(a)(1)(B)(i), such as technical information or a need to conduct an independent investigation, that might make the issue unsuitable for consideration by the district court or a magistrate judge. *Burlington N.*, 934 F.2d at 1072 ("calendar congestion, case complexity, and anticipation of a lengthy trial" are not "exceptional circumstances"); *cf. Madrigal Audio Labs., Inc. v. Cello, Ltd.*, 799 F.2d 814, 821 n.2 (2d Cir. 1986) ("[T]he fact that the case involves complex issues of fact and law is no justification for reference to a Master, but rather is a [com]pelling reason for trial before an experienced judge." (internal quotation marks omitted)). Indeed, the district court in the related *Doe* litigation has resolved these same disputes over the deliberative process privilege without the appointment of a special master. *See, e.g.*, Dkt. 405-3. Further, magistrate judges routinely handle difficult privilege disputes. For example, in the related *Stone v. Trump* litigation, a magistrate judge has handled numerous discovery matters including disputes over the deliberative process privilege. *See, e.g., Stone v. Trump*, No. 17-cv-2459 (D. Md.), Dkt. 152.

Nor do the recent General Orders related to the ongoing COVID-19 pandemic justify the appointment of a special master rather than a magistrate judge. The same social distancing recommendations that led to the closure of the Courthouse would similarly hinder a special master's ability to hold in-person proceedings. Likewise, if the Court would expect a special master to decide disputes based on the papers or a teleconference, a magistrate judge could do the same. The Government should not be required to pay for judicial services when there are magistrate judges in this district who are capable of handling the precise sorts of discovery disputes that the Court is considering referring to a special master.

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3. At the very least, this Court should not refer matters to a special master or a magistrate judge until the Ninth Circuit proceedings on Defendants' pending mandamus petition conclude. Dkt. 414. The majority of the deliberative documents over which the parties have remaining privilege disputes are the subject of the Ninth Circuit's administrative stay. *See* Dkt. 415. To refer proceedings with respect to those same documents to a special master or magistrate judge would risk circumvention of the Ninth Circuit's stay and clearly be inappropriate.

Moreover, resolution of the mandamus petition presumably will provide guidance pertinent to future review of deliberative materials. Indeed, this Court requested precisely such guidance in its response to the Government's mandamus petition. District Court's Resp., *In re Donald J. Trump*, No. 20-70365, Dkt. 15 (9th Cir. Mar. 5, 2020). It would be inefficient and a waste of resources for a special master to be appointed now.

4. For the foregoing reasons, the Government objects to the appointment of a special master, and, in particular, to bearing any of the cost of a special master. The Government also reserves its position that sovereign immunity has not been waived to permit the imposition of such costs on the United States, particularly if the Court imposes costs on a monthly basis prior to the conclusion of this litigation.[2]

5. Lastly, if the Court is inclined to appoint a special master over the Government's objection and without waiting for the resolution of the Government's mandamus petition, the Government requests additional time to propose a special master and the ability to object to any specific special master proposed by Plaintiffs or the Court.

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[2] The Government acknowledges that the Ninth Circuit has ruled that sovereign immunity does *not* bar taxing special master costs to the United States. *See Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 545–46 (9th Cir. 1987). Nonetheless, the Government preserves its position for any further review that Congress has not waived sovereign immunity to permit a court to compel the United States to bear such costs at this stage of the litigation. The *NORML* decision primarily considered purported waivers of sovereign immunity that ordinarily are applicable to taxing costs after a party has prevailed in the case. In more recent authority, the Ninth Circuit has made clear that waiver of the United States' sovereign immunity must be express. *See Al-Haramain Islamic Foundation v. Obama*, 705 F.3d 845 (9th Cir. 2012).

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Respectfully submitted,

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